

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JULIO ROCHA, : 16cv02327(RJD)
Plaintiff, :
-against- : United States Courthouse
 : Brooklyn, New York

CERTAIN UNDERWRITERS AT :
LLOYD'S, AXIS SPECIALTY :
EUROPE SE, :
Defendants. :
----- X

Tuesday, June 21, 2016
12:00 p.m.

TRANSCRIPT OF CIVIL CAUSE FOR ORDER TO SHOW CAUSE
BEFORE THE HONORABLE RAYMOND J. DEARIE
UNITED STATES SENIOR DISTRICT COURT JUDGE

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1 (In open court.)

2 THE COURTROOM DEPUTY: We are on this morning for
3 an Order to Show Cause. This is Rocha versus Certain
4 Underwriters at Lloyd's, Docket No. 16-2327, assigned to
5 Judge Dearie and Magistrate Judge Levy.

6 Can I ask the attorneys to please note their
7 appearance, beginning with counsel for Plaintiff.

8 MR. HARDIMAN: Good morning. Alexander Hardiman of
9 Pillsbury Winthrop Shaw Pittman for Plaintiff, Julio Rocha.
10 I'm joined today by Mr. William Sullivan, also of the
11 Pillsbury firm, who is criminal counsel for Mr. Rocha, and
12 Thomas Hill, also criminal counsel for Mr. Rocha.

13 MR. HILL: Good morning, Your Honor.

14 MR. SULLIVAN: Good morning, Your Honor.

15 THE COURT: Good morning, gentlemen.

16 MR. KNOERZER: Michael Knoerzer for the Defendant,
17 Certain Underwriters at Lloyd's and Axis. I am with the firm
18 of Clyde & Co. With me today are Simone Bonnet, newly
19 admitted to this court today, and Scott Schwartz.

20 MS. BONNET: Good morning.

21 THE COURT: Welcome all. If you do not mind a
22 little ribbing, if somebody is worried about attorneys'
23 costs: Two partners from Pillsbury here, including two from
24 D.C. Just a little friendly ribbing.

25 MR. SULLIVAN: It is a recently superseding

1 indictment, Your Honor, a very complex matter.

2 THE COURT: Well, I will tell you, to tackle the
3 definition of insured person, you need a slide rule and a
4 bottle of aspirin and a lot of time, but we will get to that
5 in a minute.

6 We have, of course, an application for
7 preliminary injunction. We also have, from Clyde & Co,
8 pending a request to file a motion to dismiss, I assume on
9 grounds similarly to those expressed, as you said, in your
10 letter in the context of this application.

11 MR. KNOERZER: Yes, your Honor.

12 THE COURT: The practical problem I had with that,
13 of course, is by rule I have to deal with a request for
14 equitable relief expeditiously, and I will do that. To the
15 extent that motion practice impacts that, we will just take
16 it as we see it and plan accordingly. Does that make sense?

17 MR. KNOERZER: Your Honor, I have been asked that
18 question by judges many times before and I have always said
19 yes and I won't change my practice.

20 THE COURT: Even though you think no, you say yes?

21 MR. KNOERZER: I believe that it makes sense.

22 THE COURT: Where shall we begin, gentlemen? A
23 couple of questions, first of all. Irreparable harm, I just
24 want to jump to that for a moment. Is there anything in the
25 application -- I don't see it -- about Mr. Rocha's personal

1 finances?

2 MR. HARDIMAN: No, Your Honor. There is nothing in
3 the current application about Mr. Rocha's current finances.
4 Although, I would say for the purposes of the Court, the
5 court record on the bail hearing, I believe, established that
6 for the purposes of bail, Mr. Rocha had to rely on an
7 extensive network of family and friends and friends of
8 friends and we can make a representation to the Court that
9 his personal assets are not sufficient to --

10 THE COURT: As far as you know.

11 MR. HARDIMAN: As far as we know. Should the Court
12 wish additional information or a statement from Mr. Rocha
13 regarding his personal assets, then we can certainly provide
14 the Court with that in very quick order.

15 I would like also point out, unlike his
16 co-defendants, Mr. Rocha does not own any property. This is
17 also, I think, established to a large extent in the criminal
18 proceedings, and he was unable to put up any property to
19 secure his bail bond.

20 THE COURT: When you say the co-defendant, are you
21 referring to Mr. Li?

22 MR. HARDIMAN: Mr. Li and others.

23 I believe many of them had properties in stark
24 contrast to Mr. Rocha. So what we are dealing with here is
25 someone who cannot afford the kind of complex defense that

1 this is going to require and that the policy is designed to
2 pay for. But should the Court wish further information on
3 that, on his financial wherewithal or lack thereof, we can
4 certainly get it to the Court.

5 THE COURT: It is certainly germane to the
6 discussion, is it not?

7 MR. HARDIMAN: I actually don't think it is germane
8 to the discussion, Your Honor, because the insurance policy
9 is designed to advance defense costs.

10 THE COURT: I understand your argument.

11 Now, how about other sources? There is no
12 other coverage? There is nothing?

13 MR. HARDIMAN: As a preliminary matter, we don't
14 believe that that is a relevant question before the Court as
15 set forth in our papers.

16 I can tell the Court that CONCACAF has
17 rejected his request for indemnification and request for
18 insurance. They have represented that he is not insured
19 under their policy by virtue of having not been an official
20 of CONCACAF, according to them.

21 UNCAF, which is a sub-federation, I believe,
22 also has written back and stated that they do not maintain
23 any directors and officers insurance and that he is not
24 entitled to indemnification from the organization itself.

25 FENIFUT, the other potentially implicated

1 organization, also has simply not responded. We will be
2 following up on that. But we have no information indicating
3 that there is any available other insurance that covered for
4 Mr. Rocha at this point. So the only policy and the policy
5 designed to respond is the FIFA policy.

6 THE COURT: So he and you are really on the rope?

7 MR. HARDIMAN: Yes, your Honor. Again, that's why
8 we are here for a preliminary injunction. We wish we
9 weren't. We thought that the Li decision was pretty clear,
10 certainly on the jurisdictional questions.

11 On the *forum non conveniens* rulings, those are
12 legal rulings which are binding in this case as a related
13 case, yet defendants are still arguing about this. They
14 won't even accept service. Their attorneys are here and they
15 won't even accept service. I understand they may be entitled
16 to do so, but I think that's a sign of what we are dealing
17 with in terms of the kind of good faith obligations that they
18 have under the insurance policy.

19 THE COURT: I thought that under the terms of the
20 -- I was about to use the word convention, you can serve in
21 the manner that you served, by e-mail and so forth.

22 MR. HARDIMAN: That's what we have laid out in our
23 papers, but, apparently, defendants disagree and are
24 disputing. I mean, we have served in the manner prescribed
25 by the policy, in the manner we believe is permitted under

1 the convention. We also have served the New York Department
2 of Insurance through the Insurance Law 1213, I believe it is,
3 which permits us to serve them as a foreign insured doing
4 business in New York State.

5 We can spend time talking about service
6 eventually. Even if we are wrong, which we are not, they are
7 going to get served one way or another.

8 THE COURT: Let me switch gears here for a second
9 and go to step one, which, of course, is jurisdiction. And
10 you all know that I have been heard to some extent on this in
11 a related case, not an identical case, but a related case.
12 What I don't understand from the defense, the insurer, is the
13 position there is no common nucleus effect when the very
14 problem of who is the insured person involves facts that are
15 going to be on the table in the course of this criminal case
16 and, indeed, the superseding indictment alleges facts such as
17 Mr. Rocha's employment by FIFA and so forth, as well as the
18 question I dealt with before, and that is the whole RICO
19 business, all tied in to the criminal case. I wonder if you
20 might speak to that for a second.

21 The last thing in the world I want to do -- I
22 would like to do this somewhat informally. I will not cut
23 you off. I will give you all the time you need to address
24 whatever you want to address, but I don't want to be involved
25 in resolving insurance disputes, and my colleagues will never

1 speak to me again and the Second Circuit will probably smack
2 me around. I thought this was a very unusual situation, as I
3 laid out, that does threaten the timely resolution of very
4 serious criminal charges. But in this unusual case it seems
5 to me that they are tied in, not only on the issue of
6 coverage twice, at least twice, is he an insured person and
7 is the RICO exclusion in any way applicable in this case,
8 facts that will have to be resolved during the course of the
9 criminal trial. Am I off base?

10 MR. KNOERZER: Yes, Your Honor, with respect, I
11 believe that you are. I believe in part, part of the problem
12 is that there has never been a clear enunciation to the Court
13 on what the standards are required for ancillary
14 jurisdiction.

15 I believe that the Courts or the defendant's
16 inconvenience, the criminal defendant's inconvenience is far
17 down the road in the things that you have to consider. There
18 is a threshold issue, and that is that the two claims that
19 are going to be bound together by ancillary jurisdiction have
20 to derive from a common nucleus of operative facts. If you
21 looked at the Kokkonen decision that Your Honor decided in
22 Li, the Court laid out the goals of ancillary jurisdiction
23 but not those requirements. But in that case, Your Honor,
24 there were two claims, and I think that case is, frankly,
25 very instructive. There was a claim for breach of an agency

1 agreement and that action was in Federal Court. The matter
2 was settled, and then there was an action on the settlement
3 agreement related to the breach of the agency agreement
4 action. What Judge Scalia said, writing for the Supreme
5 Court, is that the facts underlying the respondent's
6 dismissed claim for breach of an agency agreement and those
7 underlying its claim for breach of settlement agreement have
8 nothing to do with each other. It would neither be necessary
9 or either particularly efficient that they be adjudicated
10 together.

11 THE COURT: How do we say that about this case,
12 have nothing to do with each other?

13 MR. KNOERZER: The resolution of the insurance
14 issues in no way will advance the criminal prosecution or the
15 defense of Mr. Rocha. There is nothing in the -- Your Honor,
16 the Court has been thinking about the money and how the money
17 will help the man defend himself, but that's not a criteria
18 for ancillary jurisdiction. What is a criteria for ancillary
19 jurisdiction is whether the two matters are interdependent
20 and not just related, interdependent. And there is nothing
21 that will happen in the coverage action for the insurance
22 case that will in any way assist Mr. Rocha's defense, not a
23 thing. That's the way this needs to be looked at because
24 that's the way ancillary jurisdiction works.

25 THE COURT: Where are you getting this from?

1 MR. KNOERZER: It comes from all the case law, Your
2 Honor.

3 THE COURT: Particularly the word interdependent.

4 MR. KNOERZER: That is from the United States
5 Supreme Court decision in Kokkonen versus Guardian Life. It
6 was cited by you, Your Honor, in the Li case. It is 511 U.S.
7 375, factually interdependent.

8 THE COURT: Factually interdependent. So
9 factually, the coverage question here depends upon the
10 resolution of facts that are charged as part of criminal
11 indictment; yes?

12 MR. KNOERZER: I don't know enough about the
13 criminal indictment to say, Your Honor. I don't know that
14 anybody can predict that going forward.

15 THE COURT: You don't know enough about the criminal --

16 MR. KNOERZER: Your Honor, what I do know is that
17 the analysis is is there anything that needs to be decided in
18 the coverage action that is helpful to the defense action,
19 and there is nothing. That's the way this has to be looked
20 at. The question is, is there something so important in the
21 insurance coverage action that is going to be decided there
22 that it has to be brought into the criminal action because it
23 is -- because the criminal action needs the resolution of
24 these other things to be a hole, and there is nothing
25 factually related or interdependent about -- I should just

1 say factually interdependent about them.

2 THE COURT: So your view is the coverage case
3 should go its own way, presumably in Switzerland, and we
4 should leave hanging the question of Mr. Rocha's
5 representation, compensation and so forth?

6 MR. KNOERZER: Yes, your Honor, because the Court
7 does not have jurisdiction over it.

8 Issues of convenience or things like that
9 don't weigh in unless you can get past the threshold issue.
10 What we don't have is a common nucleus of operative facts
11 between the cases. I understand what the court is saying
12 about how it would be helpful to understand what hat Mr.
13 Rocha was wearing in both cases, but that does not make them
14 factually interdependent, as the United States Supreme Court
15 has said. And the convenience of the witnesses in the United
16 States -- the convenience of Mr. Rocha, as the United States
17 Supreme Court has said in Kroger, is of a secondary
18 consideration.

19 There's also, Your Honor, the other matter.

20 THE COURT: I think you would concede it is a
21 little bit more than convenience?

22 MR. KNOERZER: Your questions at the start of this
23 hearing, Your Honor, suggested that there is an open issue as
24 respects Mr. Rocha about this. What I would say is this,
25 Your Honor, you will note FIFA is not here. FIFA is not here

1 yelling that this man is an employee and is entitled to
2 coverage. FIFA has a policy that says it has a Swiss
3 jurisdiction. I think it is a matter of record that people
4 have made claims under the policy. This isn't an instance of
5 an insurer trying to duck payment. What we are looking for
6 is an orderly forum for the payments to be distributed
7 because if we pay out more money to people who aren't
8 actually covered, then we have a problem as an insurer. We
9 have a duty to FIFA. So I understand Mr. Rocha's dilemma as
10 he is stating it, that he may not have enough money to bring
11 his defense, but there are other issues involved. It
12 appears, as we have just learned, that underwriters on the
13 FIFA policy aren't the only insurers who have turned this man
14 down.

15 THE COURT: Are you suggesting that you are in the
16 nature of a stakeholder?

17 MR. KNOERZER: Well, it is an interesting question,
18 Your Honor, because we cannot, as our research suggests,
19 because of the way that we have been put into this court on
20 ancillary jurisdiction, our preliminary research suggests we
21 could not be a stakeholder, we cannot interplead funds
22 because it's ancillary jurisdiction. That's one of the many
23 problems that this particular circumstance creates for us.

24 THE COURT: Speak to that.

25 MR. HARDIMAN: Your Honor, with respect to whether

1 they can deposit with the Court an interpleader action, the
2 Court wishes me to address that?

3 I have not researched the issue, but based on
4 my experience with interpleaders, I see no reason why the
5 defendants couldn't simply institute an interpleader action
6 in this court. There is absolutely no reason for them -- if
7 they want jurisdiction in this court, just as when they
8 removed from State Court and asserted that this Court had
9 jurisdiction in the first instance in the Li action, they
10 could do so now, and they can do so pursuant to ancillary
11 jurisdiction.

12 THE COURT: It is a bit of a sticky wicket with
13 them. If they pay, for example, Mr. Rocha and FIFA says, in
14 effect, what are you doing? You are taking our protection
15 and giving it to somebody who didn't contract for it, so you
16 have just increased the value of our policy, or you have
17 increased the potential obligation of the insurer.

18 MR. HARDIMAN: No, Your Honor, it doesn't concern
19 FIFA. Mr. Rocha is an insured under this policy and we are
20 entitled -- he is entitled to payments under this policy. I
21 would like to also point out that they denied coverage.

22 THE COURT: Of course.

23 MR. HARDIMAN: This question of oh, we have got
24 competing claims, we are not even there yet.

25 THE COURT: I understand.

1 MR. HARDIMAN: So I don't think it's a relevant
2 inquiry.

3 As to Mr. Rocha's status and competing claims,
4 he is an insured under the policy, he's entitled to payments
5 under the policy. What the insurers do with respect to other
6 claimants is their issue; it's not Mr. Rocha's issue.

7 THE COURT: Interesting. It's an interesting -- by
8 no means I'm not an expert, far from it, on insurance law.
9 The carrier has obligated itself up to a certain level and
10 they are multiple claims coming in against that fund, if you
11 will. What does a carrier do? I don't know.

12 MR. HARDIMAN: Your Honor, this happens every day
13 in every D & O case, and the rule generally is first in time.

14 THE COURT: Really?

15 MR. HARDIMAN: First in time. Do they pay out the
16 claims --

17 THE COURT: First come, first serve.

18 MR. HARDIMAN: First come, first serve.

19 THE COURT: When it is depleted, it is gone.

20 MR. HARDIMAN: And when it's depleted, it's gone.

21 It's not first come, first serve to the
22 exclusion of other insurers; it is as the bills come in, they
23 get paid. And as bills from other claimants come in, those
24 also get paid until it's depleted. That's the way D & O
25 insurance works. This is not an unusual situation.

1 THE COURT: You have to protect yourself, I'm sure
2 there is language to that effect in the policy.

3 MR. KNOERZER: The language -- and I do want to
4 come back briefly to subject matter jurisdiction, Your Honor,
5 but let me address your question. The language in the policy
6 that's protective on this is the insured person's language
7 and we believe that they have not met their burden of
8 establishing that they are an insured person.

9 Before I address that, Your Honor, may I
10 address one more thing on subject matter jurisdiction?

11 THE COURT: The insured person is the principal
12 basis for the declination of coverage?

13 MR. KNOERZER: Yes, your Honor. I would freely
14 admit that if we have to start getting into the weeds about
15 what this fellow is alleged to have done when, it gets more
16 problematic on this particular preliminary injunction. We
17 are not set up for that.

18 I believe that based on the allegations it is
19 very difficult for Mr. Rocha to argue that in any way he's
20 being accused of doing anything when he had any role with
21 FIFA. But what is more important, I believe, is the man
22 can't get past the front door on the policy because he cannot
23 establish that he is an insured person. The agreement that
24 he signed with FIFA is called a development officer
25 agreement. It is in the papers.

1 THE COURT: I have read it. I understand your
2 point on that.

3 MR. KNOERZER: Okay.

4 Just for this transcript, paragraph 14 says nothing
5 in the agreement shall establish an employment, relationship,
6 and the allegations and the thrust of the arguments to you,
7 Your Honor, have been that this man is an employee of FIFA.
8 He is not an employee of FIFA.

9 THE COURT: Wish it were that simple.

10 MR. KNOERZER: Well, there is nothing else under
11 the policy that they can argue. He's not the president of
12 FIFA. He is not a vice president of FIFA. He is not a
13 member of FIFA. He doesn't have any role with FIFA that
14 makes him -- their original thrust was he's an employee of
15 FIFA. That's what they alleged in Mr. Rocha's affidavit.
16 Mr. Rocha apparently hadn't read his development officer's
17 agreement, which says he is not an employee of FIFA. So,
18 since then, they have alleged, but they do not have any
19 support, that he is all these potentially other things. But
20 we believe that when you look at the FIFA documents, as well
21 as the FIFA witness statement, that it is very clear that
22 FIFA is a separate organization from FENIFUT, which is what
23 this man was a part of; the same entity that has refused him
24 coverage. He was the president of FENIFUT and we hear that
25 FENIFUT has refused him coverage. He was never the president

1 or anything remotely like it for FIFA. It seems strange to
2 us that the former president of FENIFUT wouldn't get coverage
3 from them, but this man not even an employee of FIFA would
4 get coverage from FIFA.

5 THE COURT: I don't know what FENIFUT's
6 arrangements were, so it is hard to read too much into that.

7 Mr. Hardiman, I have read this definition, 1.3
8 definition, gosh, any number of times. I can't say that I am
9 any clearer on it. What is the strongest argument you can
10 make under 1.3 for Mr. Rocha as an insured person?

11 MR. HARDIMAN: Your Honor, we respectively disagree
12 with respect to the employee status.

13 THE COURT: The agreement says what it says, does
14 not create employment relationship.

15 MR. HARDIMAN: It says what it says, but in the
16 FIFA -- FIFA filed a restitution complaint in the criminal
17 action alleging he was a FIFA official, that they were
18 entitled to his salary back based on being employed as a --
19 as FIFA development officer. So there, you don't need to
20 look to a documentary agreement. There, you have his
21 employer seeking restitution of his salary based on his
22 status as head development officer.

23 THE COURT: Was he paid a salary?

24 MR. HARDIMAN: He was paid a salary. According to
25 this, it was I think \$7,000 a month for a year. They are

1 seeking back close to \$400,000 in what they specifically call
2 salary and bonuses and other compensation. So I think right
3 there is enough to demonstrate that he was -- they considered
4 him to be a de facto employee.

5 Now, even if that weren't the case, left
6 unaddressed by defendants in their papers and here today is
7 the catchall broad provision in 1.3 that says Coverage is
8 provided to a general agent or representative of FIFA. Now,
9 even defendants can't argue that he was not a general agent
10 or representative of FIFA. He was paid to be FIFA's head
11 development officer for Latin America, and there is simply no
12 argument on that. That is reflected in the employment
13 agreement which they have hung their hat on with respect to
14 the employee/employer status. It says This agreement does
15 only authorize and entitle the D0, Mr. Rocha, to act as a
16 representative of FIFA in any de facto dejure capacity upon
17 instructions. Put that together with Mr. Rocha's affidavit,
18 which is unrebutted, there is no affidavit from FIFA, if FIFA
19 was so concerned about this matter, all the insurers had to
20 do was call them up and say we saw that you filed a Complaint
21 for restitution from Mr. Rocha as your employee, but we'd
22 like you to submit an affidavit because apparently defendants
23 belief their interests are implicated, FIFA's. That was
24 their argument earlier. Why not have them submit an
25 affidavit? They didn't. It is unrebutted at this stage.

1 There is simply no argument on the representative and general
2 agent capacity in Section 1.3, in addition to the other
3 capacities that we have laid out.

4 THE COURT: Let's go back to jurisdiction. I'd
5 like to hear from you on that.

6 MR. HARDIMAN: Yes. Well, as a preliminary matter,
7 Your Honor, I don't think we should be hearing arguments
8 about jurisdiction. This is a rehash of a ruling that's
9 already been made. That is binding in this case, is our
10 position.

11 THE COURT: Not so fast. There are some
12 differences between this and Mr. Li's situation, not the
13 least of which is, of course, the carrier came running in
14 here to Federal Court on point. I don't know how much you
15 read into it in terms of the analysis, but -- so I'm not sure
16 I am bound by that.

17 MR. HARDIMAN: Okay. We'd respectfully --

18 THE COURT: Again, I'm very sensitive to this whole
19 idea of not wanting to get into refereeing insurance battles
20 for every nickel, dime case that comes down the pike, and
21 this is certainly not a nickel, dime case.

22 MR. HARDIMAN: We think that it is law of the case
23 because it is a pure legal issue and there's no
24 differentiating factor with Mr. Rocha in this particular
25 case. With respect to the coverage provisions, yes, it is a

1 different -- he is a different animal --

2 THE COURT: Right.

3 MR. HARDIMAN: -- he has a different job. But with
4 respect to the jurisdictional question, it is identical.

5 With respect to their arguments on
6 jurisdiction, we believe the Court properly applied the
7 Kokkonen factors. We also believe this idea that you can only
8 exercise ancillary jurisdiction where it only arises out of
9 the underlying -- the related action, the criminal action, is
10 not a correct representation of the law. If you look --

11 THE COURT: It is not an unreasonable
12 interpretation given Justice Scalia's analysis. It is the
13 hardest thing that I have had to deal with.

14 MR. HARDIMAN: Understood, Your Honor.

15 I think what it goes to is there is no clear
16 delineation --

17 THE COURT: That's for sure.

18 MR. HARDIMAN: -- in terms of factors.

19 The Second Circuit test laid out in Chesley
20 versus Union Carbide if the claim is sufficiently related to
21 an initial claim properly before the Court. It's not that
22 it has to arise out of and it can only be applied where it
23 arises out of.

24 We would also agree with the Court's reasoning
25 in the Li action that it clearly is factually interdependent

1 with the criminal action. They have -- the defendants have
2 raised the willful misconduct exclusion, for example, that is
3 dependent on what facts are established in the criminal
4 action. If he is adjudged to be guilty that is potentially
5 implicated for insurance coverage purposes. They are
6 completely intertwined. The allegations in the indictment
7 allege that he was employed by FIFA as a development officer.
8 Again, that is central to the issue that they are here about
9 arguing today, whether he was employed. The allegation has
10 been made that he was employed so that he is entitled to
11 insurance coverage under the provisions of the policy. They
12 couldn't be closer. There are numerous courts who have ruled
13 that matter of fee disputes are properly subject to ancillary
14 jurisdiction.

15 The other --

16 THE COURT: Let me interrupt. Do the practical
17 implications here -- I have got this monster criminal case.
18 You know where I am going. I have this monster criminal case
19 that I am trying to move along down the road despite the -- I
20 forget the word. Terabyte? The terabytes of information
21 that have been exchanged and have yet to be exchanged. I'm
22 trying to move the case along. It has a lot of lawyer time,
23 involves a lot of lawyers, secondary expense. I don't have
24 to explain that to you. Do those practical implications of
25 getting counsel in place -- I realize they are in the case,

1 but you know what I am talking about. Don't they count at
2 all in the analysis?

3 MR. KNOERZER: Not unless you can get past the
4 threshold issue, Your Honor, that I have described before.
5 You have to get past this interdependent factual
6 interdependence. The courts all say that. The Kroger case,
7 your clerks can look at. They all say the same thing. You
8 do not find ancillary jurisdiction until you answer that
9 question. The convenience or the efficiency does not matter,
10 cannot be discussed until you get past that. The Supreme
11 Court is very clear on that.

12 THE COURT: I wish they were so clear.

13 MR. KNOERZER: Your Honor, there are other
14 practical aspects. In a normal coverage thing, the first
15 thing I would do is take Mr. Rocha's deposition. I can't
16 take Mr. Rocha's deposition in your case; he's not going to
17 answer a single question. These are oil and water, these two
18 cases. That's why the Polishan case, the Middle District of
19 Pennsylvania, dealt with this precisely. And I apologize
20 that we haven't put that before Your Honor until -- for your
21 consideration. It is the Middle District of Pennsylvania.
22 It's a million miles away from here, but on the other hand,
23 we think it's a very well-reasoned decision and it relies on
24 United States Supreme Court authority.

25 THE COURT: I'm not surprised to hear you say that

1 as you did in your letter.

2 MR. KNOERZER: One or two other points, Your Honor.
3 There was an awful lot of discussion here about what the FIFA
4 victim statements says. It says, according to counsel, it
5 called Mr. Rocha an employee. You have lots of clerks here.
6 I challenge them to find anywhere where FIFA called Mr. Rocha
7 an employee. I challenge them to find where FIFA said that
8 he drew a salary. It says no such thing.

9 THE COURT: How do they characterize the funds that
10 they seek to --

11 MR. KNOERZER: He is an independent contractor.
12 They paid him like an independent contractor. That's what
13 the agreement says.

14 THE COURT: To be frank, I haven't looked at what
15 we are now calling the FIFA Complaint apparently. But is
16 that accurate?

17 MR. HARDIMAN: Your Honor, on page 17 of the FIFA
18 Complaint, it says the Defendant, including Rocha, by
19 depriving FIFA their honest services, the Defendant UMTA
20 unfairly obtained money from FIFA in the form of salaries.
21 So I accept counsel's challenge and there we have it. It is
22 on page 17.

23 On page 15, he is called -- Mr. Rocha is
24 called an official of FIFA and specifically named as a FIFA
25 development officer.

1 On page 8, Mr. Rocha exploited their,
2 including Mr. Rocha, FIFA positions to enrich themselves. It
3 seeks \$387,781 in salary, amounts paid by FIFA to Mr. Rocha,
4 on page 19. So, Your Honor, we -- I think it is clear that
5 FIFA regarded him as an employee.

6 Irrespective of that, we still haven't heard
7 why he wouldn't get insurance coverage for being a general
8 agent or a representative of FIFA. At a minimum, he's a
9 representative. There is no question about that.

10 I would like to go back to the jurisdictional
11 question for a moment.

12 THE COURT: Go ahead.

13 MR. HARDIMAN: The Court was inquiring about the
14 practical aspects of this. That is a component. If you look
15 at the Weissman case, which is cited in Defendants' papers,
16 in that case they talk about the availability of an
17 alternative forum of competent jurisdiction where you could
18 reasonably expect that you could get a required ruling.
19 Well, as Defendants recognized in the Li case, while there
20 may be an alternative forum in Switzerland, even Defendants
21 didn't disputed and admitted that it would take at least a
22 year to get any sort of ruling out of a Swiss court. So,
23 that effectively, under the Weissman case, means that the
24 ruling that is required in this case, whether it is a summary
25 judgment or preliminary injunction on the advancement of

1 defense costs, which is the purpose of the D & O insurance
2 policy, the central issue in the case, a year would go by and
3 it would essentially defeat the entire purpose of the D & O
4 policy. We can't get a ruling, even as admitted by the
5 Defendants, in a Swiss court in time. That was central, I
6 think, to the practicalities and central to the Weissman
7 analysis as to whether there is in fact an available forum
8 where you could reasonably expect a ruling to come out on the
9 issue presented. So the practicalities are part of factors.

10 THE COURT: There is sort of an exchange of points
11 on this whole question. You said it in your papers, if I
12 were to grant the preliminary injunction, I'm giving
13 plaintiff's everything they can conceivably want or need, a
14 full victory. On the other hand, if I don't, what they
15 contracted for, which, from their perspective, the
16 advancement of funds, fees, and so forth, is gone forever.
17 How do I reconcile that?

18 MR. KNOERZER: Your Honor, this man, Mr. Rocha,
19 didn't contract for this coverage under the policy. He may
20 have as president of the other organization that he was a
21 president of contracted for coverage, but he did not contract
22 with FIFA. He did not contract with us.

23 THE COURT: Well, the question, of course, is is he
24 an insured person. Let's assume for the sake of argument
25 that he is. What's left? Is he not entitled to the

1 advancement of funds as per the contract?

2 MR. KNOERZER: If you find, Your Honor, that he is
3 an insured person and if you find that his activity fell --
4 the alleged activity that he is accused of falls within the
5 scope of his duties as an insured person, the scope of his
6 work as an insured person, then he would be entitled to a
7 defense. And if the man later is accused of willful
8 misconduct and is convicted for it or admits to it, we would
9 be entitled to our money back. We are not denying what the
10 policy says, Your Honor. We are here to say two things: We
11 are in the wrong forum and the man isn't wearing an insured
12 person's hat.

13 THE COURT: You have a dispute that is going to
14 take at least a year or so to go back to Switzerland,
15 litigate the fact there and get some sort of a resolution.

16 MR. HARDIMAN: I think, Your Honor, that goes into
17 to the central issue in terms of balance of hardship. The
18 Defendants can get their money back. Mr. Rocha can't get his
19 defense back.

20 THE COURT: I understand.

21 MR. HARDIMAN: That's what it comes down to. I
22 mean, the entire purpose of the policy would be defeated
23 whether -- if a preliminary injunction isn't granted or if
24 the Court doesn't properly exercise its ancillary
25 jurisdiction, as it has already found it has the right to do.

1 As admitted by the Defendants already, Mr. Rocha will not be
2 able to get a ruling in Switzerland that doesn't defeat the
3 very purpose in terms of timing.

4 THE COURT: Why does it defeat? It leaves you
5 hanging.

6 MR. HARDIMAN: The purpose of advancement of
7 defense costs, it leaves Mr. Rocha hanging because he will be
8 unable to properly fund and mount a defense to a complex
9 matter and serious matter where his liberty is at stake.

10 MR. KNOERZER: Your Honor, there are a couple of
11 things: One, I'm sure the Court can read the FIFA's victim
12 statement for itself and see what it says and what it does
13 not say.

14 Secondly, I noticed that counsel now is
15 relying on two things that they didn't rely on in their
16 papers. Number one, they never cited the Weissman case,
17 which has been criticized. Whether it deserve a criticism or
18 not, it's an outlier. Nobody cites the Weissman case for
19 authority. And I don't believe that they have.

20 Lastly, Your Honor, what their entire case now
21 comes down to is not an argument that ancillary jurisdiction
22 actually exists on the merits, what they are saying is either
23 one, you decided it already, don't look at it again, or, two,
24 this is entirely a hardship case. Hardship is -- I have got
25 nothing against Mr. Rocha personally, but hardship is not the

1 standard. The standard is whether there is something in the
2 insurance matter that resolution is required in order to help
3 him in the defense of his criminal proceedings and that's not
4 the case here, and that what Kokkonen stands for.

5 THE COURT: I don't understand that. I just don't
6 understand getting resolved the question of resources to
7 afford a defense. It seems to me so fundamental.

8 MR. KNOERZER: The Second Circuit in the Stein case
9 spoke, Your Honor, to this issue. One of the things that
10 they said -- they have made the same argument, calling it a
11 fee dispute. What the Second Circuit in Stein said is a fee
12 dispute is, quote, a world away from the exercise of
13 ancillary jurisdiction in a criminal proceeding to adjudicate
14 a contract dispute. That's what was said in Stein. What
15 Stein said is trying to bring a contract dispute into a
16 criminal proceedings is a world away from one another. It's
17 different from a fee dispute.

18 Your Honor, you clearly would be making new
19 law, I believe, if you rule that an insurance coverage action
20 could be brought into a criminal proceeding, and policies
21 written all over the world would be dragged into every
22 criminal proceeding.

23 THE COURT: Well, that is the slippery slope aspect
24 of this that has always been a concern of mine.

25 It is your application, so I turn it back to

1 you.

2 MR. HARDIMAN: Your Honor, with respect to the
3 Weissman case, it has been cited. It is -- Defendants rely
4 on it in their opposition. They state, on page 13, the
5 closest analog to the case at bar in which a Court has
6 exercised ancillary jurisdiction is United States versus
7 Weissman. I want to dispel the notion that Weissman
8 apparently has no relevance this to proceeding.

9 THE COURT: They go on to say a lot more.

10 MR. HARDIMAN: What they go on to argue is the
11 availability of an alternative forum where there is a
12 reasonable expectation that a ruling could be obtained.
13 Well, if Weissman applies here, they have already admitted in
14 the Li case that there is no reasonable alternative in
15 Switzerland to get a ruling on these issues in a timely
16 manner with respect to the issue at bar.

17 The slippery slope argument with respect to
18 jurisdiction, this is not a slippery slope. This is a unique
19 case involving what they chose to insure, American risks.
20 The policy explicitly insures worldwide, including the United
21 States, risks in the United States. They chose to put a
22 Swiss forum clause in there and Swiss jurisdiction clause.
23 What is happening here is they are simply bearing the
24 consequences of that decision. It turns out that the
25 jurisdiction that they chose in this particular case, where

1 there are criminal proceedings in the United States against
2 their insured, is not an adequate forum to decide the issues
3 presented under the policy.

4 THE COURT: Okay. Anything else?

5 MR. KNOERZER: Only, Your Honor, I'm not much for
6 predictions, but I can tell you that if this is a unique
7 case, you are going to see about 20 more unique cases coming
8 down the pike.

9 THE COURT: Your admonition is appreciated.

10 MR. KNOERZER: Thank you, Your Honor.

11 THE COURT: But where do we stand on your motion?
12 Do you have a schedule? What are we doing about that? Are
13 we go to wait to see what happens? What are we going to do
14 with your motion?

15 MR. KNOERZER: I believe we need Your Honor's
16 permission to file it after we submitted the letter.

17 THE COURT: Well, you have my permission.

18 MR. KNOERZER: Rules is rules.

19 THE COURT: I need a schedule. I need to bring
20 this to a head.

21 MR. KNOERZER: Very good.

22 THE COURT: And I will do my best in the interim to
23 get this back out to you.

24 MR. HARDIMAN: Your Honor, may I add one point?
25 Just going back to the beginning of the hearing, Your Honor

1 inquired about Mr. Rocha's financial wherewithal. To the
2 extent that the Court has concerns about evidence regarding
3 his financial wherewithal in making its decision on the
4 preliminary injunction motion, we can, in very short order,
5 provide the Court with appropriate --

6 THE COURT: Let me put it to you this way, Mr.
7 Hardiman, I try to make it a stern rule not to advise or
8 coach the litigants. I'm going to leave it at that.

9 MR. HARDIMAN: Thank you, Your Honor.

10 THE COURT: Thank you, gentlemen, I appreciate your
11 time.

12 MR. KNOERZER: Thank you, Your Honor, for your
13 time.

14 * * * * *

15
16 I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.
17

18 /s/ MICHELE D. LUCCHESE

June 23, 2016

19 MICHELE D. LUCCHESE

DATE

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